

GOH CHIN SENG v. RHB BANK BHD

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COURT OF APPEAL, PUTRAJAYA

ABANG ISKANDAR JCA

BADARIAH SAHAMID JCA

IDRUS HARUN JCA

[CIVIL APPEAL NO: C-02-853-04-2013]

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24 MARCH 2015

CIVIL PROCEDURE: *Action – Res judicata – Service of originating summons ('OS') – Whether substituted service of OS substantiated and proved – Whether issues or points fully litigated in previous OS proceeding – Whether reliance on plea of res judicata and estoppels justified – Whether appellant barred from relitigating issues – Whether abuse of court process – Delay in filing action – Whether claim bad for laches*

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CIVIL PROCEDURE: *Originating summons – Setting aside – Application for service of originating summons ('OS') – Whether substituted service of OS substantiated and proved – Whether OS brought to appellant's notice – Whether substituted service at appellant's last known address proper and regular – Whether OS duly served on appellant*

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The appellant, the owner of a piece of land ('the said land'), created first and second charges over the said land in favour of the respondent for two loans advanced to her in the sums of RM90,000 and RM60,000 respectively. The appellant, however, defaulted on the loans. Therefore, the respondent filed an originating summons ('the original action') seeking an order for the sale of the land to recover the outstanding loans under the said charges. A judgment in default of appearance in respect of the originating summons was entered wherein the High Court granted the order for the sale of the land by way of a public auction. The appellant filed a summons in chambers seeking, *inter alia*, to set aside the service of the originating summons on the appellant and the public auction. The summons in chambers was dismissed by both the High Court and the Court of Appeal. Subsequently, the appellant filed an originating summons ('the instant action') seeking, *inter alia*, for the order of substituted service of the original action to be set aside. The High Court Judge, in dismissing the instant action, held that it was not appropriate for the appellant to file a similar application as all issues had already been fully ventilated and determined. The appellant therefore filed the present appeal against the said decision. Central to the issue herein was the assertion that the substituted service of the original action by the respondent to the appellant was not substantiated and proved. Consequently, the appellant submitted that the purported order for sale given by the High Court ought to be set aside *ex debito justitiae*. The respondent, however, raised the question of the application of the doctrine of *res judicata* and estoppels to the appeal herein, contending that if the learned judge had correctly considered the said doctrine, this appeal should fail in *toto*.

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A Held (dismissing appeal with costs)**Per Idrus Harun JCA delivering the judgment of the court:**

- B** (1) The appellant in her application *vide* the summons in chambers specifically sought to set aside the service of both the originating summons and the summons for directions. The evidence showed that the service of the legal process was effected by way of the substituted service. Thus, when the appellant sought to set aside the service of the originating summons and the summons for directions, she was in effect seeking to set aside the substituted service of the originating process. The appellant had averred that the originating summons and the summons for directions were served at a wrong address. The respondent had addressed the issue of the substituted service. The learned judge, in dismissing the summons in chambers, had considered this issue and decided that the service of the legal process was good as it was effected by way of the substituted service. When the matter was heard on appeal, the Court of Appeal had affirmed the decision of the judge. (para 15)
- C**
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- E** (2) All these applications, whether it sought to set aside the service of the originating summons or under the guise of impeaching the order of the substituted service, were ultimately aimed at setting aside the order for sale and to thwarting the respondent's action from accomplishing the sale. In the instant action, the court was made to go over precisely the same issues or points which had already been fully litigated by the parties in the summons in chambers of the original action. This was 'without doubt' an attempt to re-open and re-litigate the issues which was indubitably vexatious and extremely galling. Reliance on the plea of *res judicata* and estoppels was without any question justified and the doctrine applied to bar the appellant from relitigating the issue in the instant action. Through the instant action, the appellant was obviously attempting at a 'second bite of the cherry.' The appellant could not as a matter of law raise the issue again. It would be unjust to do so as this would amount to an abuse of the process of the court. (paras 17 & 18)
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- H** (3) Laches when asserted in litigation is an equitable defence and failure to pursue one's right timeously and with sufficient promptitude may attract the application of laches which operates to deny such right to the claimant. In this appeal, the relevant date which should be the applicable date in determining whether laches would apply as a defence was 23 June 2003 when the judgment in default of appearance was obtained against the appellant. There was clearly a delay of seven years in filing the instant action. The appellant had been extremely remiss in allowing a considerable and unreasonable delay in commencing the instant action. Obviously the appellant had slept on her rights and chose to do nothing despite knowing that various actions had been taken by the respondent. The appellant should not be permitted to seek the remedy as the delay had prejudiced the respondent. The claim obviously was bad for laches. (paras 20 & 21)
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(4) In construing cls. 2 and 40 of the Memorandum of Charges, a liberal approach should be adopted by giving a reasonable construction to them having regard to the surrounding circumstances. As long as the originating process of the original action was brought to the notice of the appellant, the substituted service at the last known address of the appellant was proper and regular. The official address mentioned in the advertisement was correct as it could be considered as the last known place of residence or address of the appellant. The term "Address of Service" was not defined in cl. 40 or elsewhere in the Memorandum of Charges and that cl. 36.6 thereof allowed service at the last known place of residence or address of the appellant quite apart from the address stated in the Memorandum of Charges. Accordingly, the deeming provision in cl. 40 of the memorandum applied to the substituted service of the originating process of the original action and thus, the original action was duly served on the appellant. The appellant had accordingly failed to discharge the burden of proving that the service was irregular. (paras 24 & 25)

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Bahasa Malaysia Translation Of Headnotes

Perayu, pemilik sebidang tanah ('tanah tersebut') telah membuat gadaian pertama dan kedua ke atas tanah tersebut untuk manfaat responden berkaitan dua pinjaman yang telah diberikan kepadanya dalam jumlah RM90,000 dan RM60,000. Perayu, walau bagaimanapun, gagal membayar pinjaman. Oleh itu, responden memfailkan saman pemula ('guaman asal') menuntut suatu perintah bagi penjualan tanah untuk mendapatkan semula pinjaman yang belum dijelaskan di bawah gadaian-gadaian tersebut. Satu penghakiman ingkar kehadiran berkenaan saman pemula telah dimasukkan di mana Mahkamah Tinggi telah membenarkan perintah bagi jualan tanah melalui lelongan awam. Perayu memfailkan saman dalam kamar menuntut, antara lain, untuk mengenyahkan penyerahan saman pemula ke atas perayu dan lelongan awam tersebut. Saman dalam kamar telah ditolak oleh kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan. Kemudiannya, perayu memfailkan saman pemula ('guaman ini') menuntut, antara lain, supaya perintah serahan ganti guaman asal diketepikan. Hakim Mahkamah Tinggi, dalam menolak guaman ini, memutuskan bahawa adalah tidak sesuai untuk perayu memfailkan permohonan yang sama kerana kesemua isu telah pun diputuskan. Perayu oleh itu, memfailkan rayuan ini terhadap keputusan tersebut. Isu utama di sini adalah dakwaan bahawa serahan ganti guaman asal oleh responden kepada perayu tidak berasas dan tidak dibuktikan. Oleh itu, perayu menghujahkan bahawa perintah jualan yang telah diberikan oleh Mahkamah Tinggi harus diketepikan *ex debito justitiae*. Responden, walau bagaimanapun, membangkitkan persoalan penggunaan doktrin *res judicata* dan estoppel kepada rayuan ini, dengan hujahan bahawa jika hakim telah dengan betul mengambil kira doktrin tersebut, rayuan ini harus gagal sepenuhnya.

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A Diputuskan (menolak rayuan dengan kos)**Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:**

- B** (1) Perayu dalam permohonannya melalui saman dalam kamar dengan khususnya menuntut untuk mengeneipkan penyerahan kedua-dua saman pemula dan saman untuk arahan. Keterangan menunjukkan bahawa penyerahan proses undang-undang telah dilaksanakan melalui serahan ganti. Oleh itu, apabila perayu menuntut untuk mengeneipkan penyerahan saman pemula dan saman untuk arahan, perayu sebenarnya menuntut untuk mengeneipkan serahan ganti proses asal. Perayu telah menyatakan bahawa saman pemula dan saman untuk arahan telah diserahkan kepada alamat yang salah. Responden telah menangani isu serahan ganti. Hakim, dalam menolak saman dalam kamar, telah mengambil kira isu ini dan memutuskan bahawa penyerahan proses undang-undang adalah betul kerana ia telah disampaikan melalui serahan ganti. Apabila perkara ini dibicarakan semasa rayuan, Mahkamah Rayuan telah mengesahkan keputusan hakim.
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- E** (2) Semua permohonan-permohonan di sini, sama ada menuntut untuk mengeneipkan penyerahan saman pemula atau percubaan untuk mencabar kebolehpercayaan perintah serahan ganti, adalah pada dasarnya bertujuan untuk mengeneipkan perintah jualan tanah dan untuk menggagalkan tindakan responden dari mencapai jualan tersebut. Dalam guaman ini, mahkamah terpaksa mengulangi isu-isu atau perkara-perkara sama yang telah pun dilitigasikan sepenuhnya oleh pihak-pihak dalam saman dalam kamar guaman asal. Tidak diragui, ini adalah usaha untuk membuka semula dan melitigasikan semula isu-isu yang tentunya menyusahkan dan amat melampau. Tanpa dipersoalkan, pergantungan kepada *res judicata* dan estoppel adalah wajar dan doktrin adalah digunapakai untuk menghalang perayu daripada membuat litigasi semula ke atas isu dalam guaman ini. Melalui guaman ini, perayu jelas mencuba mendapatkan peluang kedua. Perayu tidak boleh dari segi undang-undang membangkitkan isu ini sekali lagi. Adalah tidak adil berbuat demikian kerana ia berjumlah kepada penyalahgunaan proses mahkamah.
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- H** (3) Kelewatan jika dibangkitkan di dalam pertikaian adalah satu pembelaan disisi ekuiti dan kegagalan untuk menuntut hak seseorang mengikut masa dan dengan ketangkasan yang memadai boleh menarik pemakaian doktrin lewat yang beroperasi bagi menafikan hak tersebut kepada pemohon. Dalam rayuan ini, tarikh relevan yang sepatutnya menjadi tarikh yang digunapakai dalam memutuskan sama ada kelewatan terpakai adalah 23 Jun 2003 apabila penghakiman keingkaran kehadiran diperolehi terhadap perayu. Adalah jelas bahawa terdapat kelewatan tujuh tahun dalam memfailkan guaman ini. Perayu telah lalai dalam membenarkan kelewatan yang tidak munasabah dalam memulakan guaman ini. Secara jelasnya, perayu telah terlepas haknya dan memilih
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untuk tidak mengambil tindakan walaupun dia tahu bahawa beberapa tindakan telah diambil oleh responden. Perayu tidak sepatutnya dibenarkan menuntut remedi kerana kelewatan telah memprejudiskan responden. Tuntutan jelas tidak ampuh dan tertolak kerana kelewatan.

- (4) Dalam mentafsirkan kl. 2 dan 40 Memorandum Gadaian, pendekatan yang liberal perlu digunapakai dengan memberikan tafsiran yang munasabah kepadanya dalam mengambil kira keadaan sekitar. Selagi proses pemula bagi guaman asal dibawa kepada pengetahuan perayu, serahan ganti di alamat terakhir perayu yang diketahui adalah betul dan teratur. Alamat rasmi yang disebut dalam iklan adalah betul kerana ia boleh diambil kira sebagai alamat kediaman terakhir perayu yang diketahui. Istilah 'Alamat Penyerahan' tidak ditakrifkan dalam kl. 40 atau di mana-mana tempat lain dalam Memorandum Gadaian dan kl. 36.6 membenarkan penyerahan di alamat kediaman terakhir perayu yang diketahui berasingan daripada alamat yang dinyatakan dalam memorandum gadaian. Oleh sebab itu, peruntukan dalam kl. 40 Memorandum Gadaian terpakai kepada serahan ganti proses pemula guaman asal dan dengan itu, guaman asal telahpun diserahkan dengan sewajarnya kepada perayu. Perayu telah gagal untuk membuktikan bahawa serahan adalah tidak teratur.

Case(s) referred to:

Amanah Merchant Bank Bhd v. Lim Tow Choon (Through Official Assignee) [1994] 2 CLJ 1 SC (*refd*)

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC (*refd*)

Chemfert Sdn Bhd & Anor v. Lim Hua [2010] 7 CLJ 491 CA (*refd*)

Everise Hectares Sdn Bhd v. Citibank Bhd [2011] 2 CLJ 25 CA (*refd*)

Koh Thong Kuang v. United Malayan Banking Corporation Bhd [1994] 4 CLJ 488 SC (*refd*)

North West Water Ltd v. Binnie & Partners (a firm) [1990] 3 All ER 547 (*refd*)

OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd [1997] 2 CLJ 534 CA (*refd*)

Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur [2009] 1 LNS 1457 HC (*refd*)

Superintendent of Pudu Prison & Ors v. Sim Kie Chon [1986] 1 CLJ 548; [1986] CLJ (Rep) 256 SC (*refd*)

YAM Tengku Ali Ibni Almarhum Sultan Sulaiman v. Kerajaan Negeri Terengganu Darul Iman [1996] 1 CLJ 649 HC (*refd*)

Legislation referred to:

National Land Code, ss. 256, 265(3)(b)

Rules of the High Court 1980, O. 24 r. 4(1)

For the appellant - R Sarengapani; M/s Ab Aziz & Rakan-Rakan

For the respondent - A Ramanathan; M/s Loke Chew & Zainal

[Appeal from High Court, Kuantan; Originating Summons No: 24-205-2010]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Idrus Harun JCA:

B [1] On 25 January 1992, the appellant, the owner of a piece of land held under GM 5157 Lot 7239, Mukim of Chukai, Kemaman, Terengganu, created first and second charges over the said land in favour of the respondent for two loans it had advanced to her in the sums of RM90,000 and RM60,000 respectively. The appellant however, had defaulted and by 26 June 2002 the total amount she owed the respondent stood at RM464,072.39.

C [2] Following the default, the land administrator for the District of Kemaman had, on 18 July 1999, ordered for the land to be sold by public auction.

D [3] Two public auctions were held on 18 April 2001 and 19 September 2001. However, it was not successful as there were no bidders. As such, the land administrator, pursuant to s. 265(3)(b) of the National Land Code 1965, issued a certificate of reference to the respondent allowing it to refer the matter to the court and apply for the substitution of the land administrator's order with an order for sale under s. 256 thereof. On 24 July 2002, the respondent filed an Originating Summons No. 21-129-2002 in the High Court at Kuantan, Pahang (the original action) seeking an order for the sale of the land in order to recover the outstanding loans under the said charges.

F [4] Subsequently, a judgment in default of appearance in respect of the originating summons was entered on 23 June 2003, wherein the High Court granted the order for the sale of the land by way of a public auction fixed for 15 October 2003.

[5] Consequent to the said judgment, the appellant filed a summons in chambers on 8 April 2005 seeking the following orders:

- G (a) the defendant be given leave to make this application;
- (b) the order for sale dated 23 June 2003 be set aside;
- (c) service of summons for directions dated 28 June 2003 on the defendant be set aside;
- (d) service of the originating summons on the defendant be set aside;
- H (e) alternatively the defendant be given leave to enter appearance; and
- (f) the public auction on 30 March 2005 be set aside.

I [6] The summons in chambers was dismissed by High Court Judge Dato' Abd Halim bin Aman J on 11 September 2006. The appellant's appeal to the Court of Appeal was dismissed on 22 June 2010 but she did not file for leave to appeal to the Federal Court.

[7] Instead, on 23 August 2010, the appellant filed an Originating Summons No. 24-205-2010 (the instant action) seeking the following orders:

- (a) the order for the substituted service of the Originating Summons No. 24-129-2002 (the original action) on the plaintiff by the defendant be set aside;
- (b) the service of the notice of appointment to hear the Originating Summons No. 24-129-2002 (the original action) be set aside;
- (c) the order given on the summons for directions be set aside;
- (d) declaration that the sale by public auction on 30 March 2005 was not valid and void;
- (e) cost of this action; and
- (f) reliefs deemed expedient by this court.

The instant action was dismissed by High Court Judge Dato' Mariana bt Hj Yahya J ('the learned judge') on 11 March 2013. The appellant thereupon appealed against the said decision to this court which is the instant appeal before us.

[8] It is important to mention briefly at this point that the main and only ground upon which the decision was arrived at in dismissing the appellant's application in the instant action was premised on the application of the doctrine of *res judicata*. According to the learned judge, the instant action was similar to the application made by way of the summons in chambers which was dismissed by the High Court on 11 September 2006. The decision essentially shows that it was not appropriate for the appellant to file a similar application as all issues had already been fully ventilated and determined. Accordingly, the doctrine of *res judicata* applied and the appellant was estopped from filing the instant action.

[9] The appellant's arguments before us primarily concerned the issue of the service of the original action on the appellant. Central to the issue was the assertion that the substituted service of the original action by the respondent to the appellant was not substantiated and proved. Consequently, for the appellant it was submitted that the purported order for sale given by the High Court pursuant to the judgment in default of appearance on 23 June 2003 ought to be set aside *ex debito justitiae*.

[10] However, the respondent, in answer to the appellant's argument as regards the above issue, raised the question associated with the application of the doctrine of *res judicata* and estoppel to the appeal before this court contending that if the learned judge correctly considered the said doctrine, this appeal should fail in *toto*. This argument, seen in light of the issues litigated and adjudicated by the High Court in the summons in chambers

A application, got us ruminating on the question of the plea of *res judicata* first in view of its importance the answer to which we think will ultimately determine this appeal.

B [11] It is settled in the authorities that *res judicata* simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatam*. The *res judicata* rule dictates that when a matter between two parties has been adjudicated by a court, the matter may not be pursued further by the same parties because the judgment becomes the truth between such parties, its application produces finality in litigation and one ought not to be vexed twice for the same cause of action. Since *res judicata* creates an estoppel *per rem judicatam*, the doctrine of *res judicata* is really the doctrine of estoppel *per rem judicatam*.

D [12] The plea of *res judicata* has been amplified further when it is said that the doctrine comprises two distinct forms of estoppel that is to say, cause of action estoppel and issue estoppel. Cause of action estoppel is confined to cases where the cause of action and the parties are the same in the second suit as they were in the first suit in which case the bar is absolute. On the other hand, issue estoppel would involve going over precisely the same issue or point already decided in the first action or refer to an issue that has been previously litigated and determined between the parties and the same issue is raised in a subsequent proceeding between the parties involving a different cause of action to which the same issue is relevant and one of the parties seek to reopen the issue. In such situation relitigating those same issues in a civil action is precluded. In short, issue estoppel prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action.

G [13] In setting out the above fundamental principles governing this doctrine, we are merely echoing the various judicial pronouncements made thereon in the following cases of *North West Water Ltd v. Binnie & Partners (a firm)* [1990] 3 All ER 547, *OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd* [1997] 2 CLJ 534, *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189, *Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur* [2009] 1 LNS 1457; [2010] 8 MLJ 57 and *Chemfert Sdn Bhd & Anor v. Lim Hua* [2010] 7 CLJ 491.

H [14] Having stated the law on the doctrine of *res judicata*, we shall now turn to consider the nature of the claims in both the original action and the instant action and thus, whether the doctrine can be applied to the present appeal. As we have mentioned a moment ago, as regards the original action, the respondent had obtained the judgment in default of appearance which allowed the respondent to recover the outstanding loans under the two charges by way of an order for the sale of the subject land. However, the appellant applied by way of the summons in chambers seeking amongst others, the setting aside of the order for sale dated 23 June 2003, the service of summons for directions dated 28 June 2003 on the defendant, the service

of the original action on the defendant and the public auction on 30 March 2005. The application was dismissed by the High Court and the appellant's appeal against the said dismissal was dismissed by the Court of Appeal. The appellant subsequently filed the instant action before the High Court seeking reliefs which we have no hesitation in holding were strikingly similar to the above-mentioned reliefs and these were:

- (a) the order for the substituted service of the original action on the appellant by the respondent be set aside;
- (b) the order given on the summons for directions be set aside; and
- (c) declaration that the sale by public auction on 30 March 2005 was not valid and void.

[15] Learned counsel for the appellant contended that the hearing of the summons in chambers was not disposed of on the specific ground of substituted service. We should say, in this regard, that the appellant in her application *vide* the summons in chambers specifically sought to set aside the service of both the originating summons and the summons for directions and the evidence shows that the service of this legal process was effected by way of the substituted service. Thus, when the appellant sought to set aside the service of the originating summons and the summons for directions, she was in effect seeking to set aside the substituted service of the originating process. In fact, in her affidavit in support, the appellant had averred that the originating summons and the summons for directions were served at a wrong address. The respondent moreover had also addressed the issue of the substituted service in its affidavit in reply and additionally the appellant's previous solicitors, fully aware of this issue, had replied on the same in the submission. The learned judge, it is to be observed, in dismissing the summons in chambers had considered this issue and decided that the service of the legal process was good as it was effected by way of the substituted service. When the matter was heard on appeal, the Court of Appeal affirmed the decision of the learned judge.

[16] However, the case did not end with the Court of Appeal's decision when the appellant, on 27 January 2011, had applied pursuant to O. 24 of the Rules of the High Court 1980 for discovery of documents relating to the order for the substituted service in respect of the original action. The application was dismissed by the High Court on 30 March 2011. Relying on O. 24 r. 4(1) of the Rules of the High Court 1980, the learned judge held that the issue of *res judicata* and estoppel should be determined before any discovery of documents was made by the appellant. The application, according to the learned judge, was an abuse of the court process. Once again, the decision was affirmed by the Court of Appeal on 29 October 2012. Therefore, we are not persuaded by the appellant's persistent argument

A through her learned counsel that, despite the issue having been fully ventilated twice in the previous applications during the hearing of the first instance and during the appeal, the application was wrongly and perversely refused by the court.

B [17] The appellant sought to justify the filing of the instant action by
C contending that the same was filed for the impeachment of the order of the
substituted service of the original action. Whatever explanation or
justification there may be in such a case, in our judgment, all these
D applications, whether it sought to set aside the service of the originating
summons or it was under the guise of impeaching the order of the substituted
service, were ultimately aimed at setting aside the order for sale of the subject
land and to thwart the respondent's action from accomplishing the sale.
Clearly in the instant action, the court was made to go over precisely the
same issue or point which had already been fully litigated by the parties in
the summons in chambers of the original action as well as the application for
discovery. This is without doubt, an attempt to reopen or re-litigate the issue
which to our mind is indubitably vexatious and extremely galling.

E [18] It is plainly true that both the original and instant actions, in essence,
seek to set aside the order for sale of the subject land and indeed the
appellant's challenge in both actions on the service of the originating
summons in the original action would undeniably, if successful, have the
effect of setting aside the said order for sale as well. There were no other
reasons that the appellant relied on in order to set aside the said order for
sale. The instant action manifestly involved the same cause of action and
issues which had already been fully litigated and decided upon previously by
F the court in the original action. That being so, in our judgment, reliance on
the plea of *res judicata* and estoppel is without any question justified and the
doctrine applies to bar the appellant from relitigating the issue in the instant
action. It is patently clear that through the instant action, the appellant sought
to set aside the service of the original action and the order for sale of the land
for the second time, an obvious attempt at a 'second' bite of the cherry. The
G appellant could not as a matter of law raise this issue again (*Everise Hectares
Sdn Bhd v. Citibank Berhad* [2011] 2 CLJ 25; [2011] 2 AMR 705). Therefore,
it would be most unjust to do so as this would undoubtedly amount to an
abuse of the process of the court.

H [19] We would further add that even if the purported impeachment of the
order for the substituted service of the original action was not, as contended
by learned counsel for the appellant, the issue ventilated in the summons in
chambers, the appellant in our view should have or could have done so in
the previous original action. The plea of *res judicata* in its amplified and wider
I sense is also available to the respondent to bar the appellant from mounting
a legal challenge in the instant action raising the issue which she should or

could have raised in the earlier proceedings but did not and to prevent an abuse of the process of the court. We would in this regard refer to the Federal Court's decision in *Superintendent of Pudu Prison & Ors v. Sim Kie Chon* [1986] 1 CLJ 548; [1986] CLJ (Rep) 256; [1986] 1 MLJ 494 which succinctly explained the doctrine in its wider sense as follows:

It would suffice in this regard to refer to the judgment of the Privy Council in *Brisbane City Council and Myer Shopping Centres Pty. Ltd. v. Attorney-General for Queensland* [1979] AC 411 [at p. 425].

The second defence is one of *res judicata*. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram V-C in *Henderson v. Henderson* [1843] 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v. Commissioner of Taxation* [1926] AC 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581. It was, in the judgment of the Board, there described in these words:

... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. (p. 590).

The attempt by way of the instant proceedings to relitigate and re-open the earlier action clearly reflects the appositeness of the caption suggested for this matter in the prelude to this judgment and would appear to us to be as clear an instance of an abuse of the process of the Court ...

The doctrine was further elucidated by the Federal Court in the case of *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 wherein Peh Swee Chin FCJ writing the judgment of the court said:

The doctrine of *res judicata* is not confined to causes of action or issues which the Court is actually asked to decide or has already decided. It covers also causes of action or issues or facts which, though not already decided as a result of the same not being brought forward due to negligence, inadvertence or deliberately, are so clearly part of the subject matter of the litigation and so clearly could have been raised, that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them.

[20] The appeal before us primarily turned on the critical issue of *res judicata* and our decision in applying this doctrine to the instant action would be sufficient to dispose of this appeal. Despite our finding however, we feel

- A compelled and appropriate to move on to delve into other relevant issues if the doctrine is not applicable to the instant action. One pertinent point which was raised by the respondent was that the appellant was guilty of extreme laches if the plea of *res judicata* failed adding that the instant action could be deemed a new application filed by the appellant after 11 years following the
- B date of the first order for sale by the land administrator on 18 July 1999, or seven years, as admitted by the appellant. We agree that if the plea of *res judicata* should fail, the instant action should be treated as a fresh application with a completely new cause of action and issue. In our view however, the relevant date which should be the applicable date in determining whether
- C laches would apply as a defence is 23 June 2003 when the judgment in default of appearance was obtained against the appellant. This is because the new issue for determination was the order for the substituted service which relates to the said judgment in default of appearance. Thus, there was clearly a delay of seven years and it was a bit too long for the respondent to wait to be sued.
- D [21] Laches when asserted in litigation, is an equitable defence and failure to pursue one's right timeously and with sufficient promptitude may attract the application of laches which operates to deny such right to the claimant. In this appeal, the appellant had been extremely remiss in allowing a considerable and unreasonable delay in commencing the instant action.
- E Obviously the appellant had slept on her rights and chose to do nothing despite knowing that various actions had been taken by the respondent. The appellant had waited too long to bring the instant action and in our judgment, she should not be permitted to seek the remedy as the delay had prejudiced the respondent. There must be an end to litigation (see *Y.A.M. Tengku Ali Ibni Almarhum Sultan Sulaiman v Kerajaan Negeri Terengganu Darul Iman* [1996]
- F 1 CLJ 649). The claim obviously is bad for laches. We agree with learned counsel for the respondent that the appellant had failed to give a reasonable explanation as regards her extreme delay in filing the instant action and accordingly the appellant was guilty of laches after a slumber of seven years.
- G [22] The main issue put forward by the appellant in the memorandum of appeal was that the learned judge had based on her own belief, refused and failed to evaluate evidence in dismissing the summons in chambers and that the respondent did not adduce evidence with respect to the service of the original action. The appellant alleged that the respondent had failed to serve the original action at the address given in the memorandum of charges which
- H was No. 2992, Taman Sri Jakar, Jalan Feri Lama, Kemaman, Terengganu. Instead, the original action was served on the wrong address which was No. 2929, Taman Sri Jakar, Jalan Feri Lama, Kemaman, Terengganu. In consequence, the respondent was unable to effect the personal service of the legal process on the appellant. We need only say on this aspect that the
- I respondent indeed had admitted that there were attempts to serve the original action on the appellant at the above-mentioned incorrect address and not at

No. 2992 given in the memorandum of charges. However, notwithstanding the admission, the respondent's immediate riposte was that, this had not prejudiced the appellant as she did not reside at the said address but at all material times she resided at Lot 271 B2, Taman AST, 70200 Seremban, Negeri Sembilan. The official search showed that the appellant resided at the said address since 10 July 1998. The original action was filed on 24 July 2002. As personal service at the official address was unsuccessful, the order for substituted service of the original action was obtained and the said order was advertised with the official address and the incorrect address, the appellant's name and a new and old identity card numbers stated therein.

[23] We are mindful of the fact that cl. 40 of the memorandum of charges provides that the service of any legal process may be given by prepaid registered or ordinary post sent to the respective address for service of the parties and such legal process shall be deemed to have been duly served after the expiration of five days from the date it is posted. We pause to observe at this point that the expression 'address for service' is not defined in the memorandum of charges at all nor does the memorandum of charges provide for address for service of the parties and herein lies the difficulty. Indeed, the omission to define the term has raised an important question of whether we can consider and accept the address stated in the memorandum of charges as the address for service? It would appear to be so, however, the term 'legal process' in cl. 40 is defined in cl. 36(6) in the memorandum of charges as "pleadings, all forms of originating processes ... notices required to be given to the other under the security" and there is moreover cl. 2 which provides that any demand for payment may be made by a notice ... and such notice shall be deemed to have been sufficiently served on the chargor if it is left at the usual or last known place of residence or at the address above stated of the chargor or at the usual or last known place of business of the chargor or sent by registered letter.

[24] Thus while the definition of the term 'legal process' includes notice in cl. 2 of the memorandum of charges and the service of such notice under the said clause can be effected at any address stated therein, the service of legal process which includes a notice in cl. 40 thereof on the other hand can be effected only at the address for service but the memorandum of charges has omitted to define the term nor provide for the address of service of the parties. The clauses, with its attendant ambiguity, uncertainty and contradictions, have caused difficulty in construing it. We are of the view that in construing these clauses in particular cl. 40, a liberal approach should be adopted by giving a reasonable construction to it, having regard to the surrounding circumstances. The memorandum of charges should be given a reasonable business meaning and should not be construed so as to render it ineffective, contradictory or illusory (see *Amanah Merchant Bank Bhd v. Lim Tow Choon (Through Official Assignee)* [1994] 2 CLJ 1; [1994] 1 MLJ 413 SC). Thus, taking into account the fact that service of process serves to give notice

- A to the defendant of the proceedings and to command him to either respond to the process or to appear at any specified time and answer the claim, the proper meaning the court ought to give, in the context of cls. 40, 36(6) and 2 of the memorandum of charges, is that as long as the originating process of the original action was brought to the notice of the appellant, the
- B substituted service at the last known address of the appellant was proper and regular. The official address mentioned in the advertisement was in our judgment correct as it could be considered as the last known place of residence or address of the appellant. In giving such interpretation, we also take into account the fact that the term 'address of service' is not defined in
- C cl. 40 or elsewhere in the memorandum of charges and that cl. 36(6) thereof allows service at the last known place of residence or address of the appellant quite apart from the address stated in the memorandum of charges. Accordingly, the deeming provision in cl. 40 of the memorandum applied to the substituted service of the originating process of the original action and we come to the inevitable finding that the original action was duly served on the
- D appellant (see *Amanah Merchant Bank Bhd v. Lim Tow Choon, supra*).

- [25] In the appellant's affidavit in respect of the original action, the appellant stated that she was informed by somebody that her property had been fixed for auction. Her solicitor had also replied on the issue of the
- E substituted service order in the submission. In any event, the learned judge in dealing with this issue had made a finding that following the advertisement of the order for substituted service, Messrs Ghulam Development and Construction Sdn Bhd the 'purported owner' of the land pursuant to the power of attorney had been in communication with the respondent's solicitors. These facts undoubtedly show that the substituted service effected
- F by way of the advertisement was effective and sufficient service to bring the original action to the notice of the appellant. In the case of *Koh Thong Kuang v. United Malayan Banking Corporation Berhad* [1994] 4 CLJ 488; [1994] 3 MLJ 509, where the appellant borrower evaded service and did not reside at the last known address but filed his affidavit two days after substituted
- G service was effected, the Supreme Court held that the fact that he filed the affidavit after the substituted service effected demonstrated the efficacy of the substituted service provided by the rules. The learned judge in the instant case was satisfied that the service was regular and this decision was affirmed by the Court of Appeal. After considering the material evidence before us,
- H we are equally satisfied that the instant action and the affidavit in support thereof did not show that the service of the original action was irregular. The appellant had accordingly failed to discharge the burden of proving that the service was irregular.

- [26] In all the circumstances and for the reasons to which we have alluded,
- I we accordingly come to the ineluctable conclusion that the instant action arose from the same issues, facts and cause of action raised in a previous action. The principle of *res judicata* and estoppel should apply to preclude the

appellant's claim from being proceeded with against the respondent. Further, it must be emphasised in our conclusion that the equitable doctrine of laches worked against the appellant in this appeal. The appellant had also failed to prove that the service of the original action was irregular. In the event, we dismissed this appeal with cost of RM7,000 to be paid to the respondent and the deposit to account of costs to the respondent.

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